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No. 81-2221

In the Supreme Court of the United States

OCTOBER TERM, 1982

JAMES M. RUTLEDGE, PETITIONER

v.

SMALL BUSINESS ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner contends that the court of appeals erred in affirming an order of the district court granting summary judgment for respondent Small Business Administration (SBA) in a suit in which petitioner claimed that the SBA's denial of assistance to petitioner's business constituted racial discrimination.[1] Summary judgment was appropriate, however, because petitioner has never raised any factual issues to support his claim of discrimination.

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[1]The summary affirmance of the court of appeals (Pet. App. 11) is reported at 669 F. 2d 732, and the denial of rehearing en banc (Pet. App. 12-13) is reported at 671 F. 2d 1380. The district court's initial opinion (App., *infra*, 1a-5a) and its denial of a motion for a new trial (Pet. App. 3-6) are not reported.

1. Petitioner, appearing *pro se* in the courts below,[2] is a black male doing business as "Nile Papyrus Company." He initially applied to the SBA for assistance under the Section 8(a) program[3] as a *distributor* of paper products (App., *infra*, 3a). Petitioner's initial application of September 15, 1976, was rejected because the Dallas SBA officer learned that there were no government contracts suited to petitioner's kind of business (*ibid.*). Petitioner's second application, submitted on July 12, 1977, was not processed because the SBA Administrator had imposed a nationwide moratorium on the processing of Section 8(a) applications (App., *infra*, 3a). Nonetheless, in August 1977, during the moratorium, the SBA learned of possible contract support for a paper *conversion* business and discussed with petitioner the feasibility of his operating such a business (*id.* at 3a-4a). Petitioner's third application, submitted in November 1977, after the moratorium had been lifted, sought assistance as a paper conversion business. Petitioner received preliminary approval and was told to submit the required business plan information, but he never did so (*id.* at 4a). Hence, a completed application was never submitted to the SBA (*ibid.*).

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[2]An attorney did attempt to assist petitioner in his dealing with the SBA but chose not to represent him in the district court (App., *infra*, 5a).

[3]The Section 8(a) program, which offers assistance to minority businesses to help them become competitive, derives its popular name from its source in Section 8(a) of the Small Business Act, as amended, 15 U.S.C. (Supp. IV) 637(a). There are two stages in obtaining Section 8(a) assistance: (1) the SBA determines that the applicant owns a disadvantaged small business; and (2) the SBA ascertains whether there are possible government contracts matching the applicant's type of business. When the SBA locates such contracts, the applicant submits additional information, including detailed financial, management and technical information concerning the business, prior to final SBA approval (App., *infra*, 2a-3a).

From January 1978 through June 1979, the SBA made numerous inquiries in the paper converting industry in order to supply petitioner with the necessary information, and the SBA even located a source for the equipment petitioner would need to set up a conversion facility (App., *infra*, 4a). The SBA assigned a business adviser to assist petitioner in submitting the required information and paid more than $2,000 to outside business consultants who attempted to assist him (*id.* at 4a). The consultants' reports concluded that petitioner lacked the necessary business and technical expertise and economic resources to operate a paper converting business (*ibid.*).

Based upon these facts, the district court found that "the unsupported conclusions alleged by the [petitioner] do not raise any fact issue of racial discrimination" (App., *infra*, 5a). Accordingly, the court granted the government's motion for summary judgment (*ibid.*).

On May 13, 1981, the district court, in response to petitioner's "Notice of Appeal" and "Statements of Undisputed Facts," issued an order again concluding that there was no genuine issue of fact and that the SBA was entitled to judgment as a matter of law (Pet. App. 3-6). With respect to petitioner's allegation that the SBA initially sought contract support at an amount it knew to be below the level of support available to his type of business, the court noted that the procurement requirements established by the General Services Administration (GSA) for awards to small businesses specified that they applied only to businesses with 750 or more employees; petitioner's company had only one employee (*id.* at 4). Petitioner alleged that he travelled to Washington, D.C., because he felt the Dallas SBA office was insufficiently diligent in locating support for a paper *dealer* such as himself, and that only through his efforts did

he learn of GSA support for a paper *manufacturing* operation and did the SBA learn of support for a paper *conversion* operation. The district court concluded: "Again, this fails to raise a fact issue in support of a claim of racial discrimination" (*id.* at 5).[4] The remaining allegations, as the court found, "merely establish that in order to assist him in completing the required business plan information * * *, [petitioner] felt he was entitled—at SBA expense—to the services of a private consulting firm other than the two or more consulting firms to whom the SBA paid over $2,000 to assist the [petitioner]" (*ibid.*). The court, treating petitioner's submission as a motion for a new trial, denied the motion.

2. Petitioner's allegations of racial discrimination are wholly conclusory and are not supported by any alleged facts. The record reveals only the SBA's unstinting attempts to help petitioner qualify for Section 8(a) assistance. This included making suggestions as to how petitioner could alter his operation in order to gain contract support and expending more than $2,000 for outside business consultants. After carefully reviewing every factual allegation and duly noting the special position of a *pro se* litigant attempting to establish a case of racial discrimination, the district court concluded that under the facts alleged no discrimination had occurred. Petitioner's failure to obtain Section 8(a) assistance was entirely due to his own failure to submit the required information regarding his business. Fed. R. Civ. P. 56(c) provides that summary judgment is appropriate

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[4]The court added that within three days of the SBA's learning of the support for a manufacturer, SBA representatives met with petitioner to discuss the possibility of his operating a paper converting business (Pet. App. 5).

where, as here, no genuine issue exists as to any material fact. See, *e.g.*, *Agosto* v. *INS*, 436 U.S. 748, 754 (1978); *United States* v. *Diebold, Inc.*, 369 U.S. 654, 655 (1962).[5]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

OCTOBER 1982

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[5]For the same reasons, petitioner's claim (Pet. i) that the district court employed an excessively deferential "substantial evidence" standard of review of the SBA's actions is completely without merit.

DOJ-1982-10

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

FILED:
MAR. 9 1981

JOSEPH McELROY, JR., CLERK

BY_____
Deputy

JAMES M. RUTLEDGE,	)	
	)	
Plaintiff,	)	
	)	
VS.	)	CA 3-79-0780-R
	)	
SMALL BUSINESS ADMINISTRATION,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

This is a racial discrimination case brought under 42 U.S.C. § 1981 by plaintiff James Rutledge, *pro se*, against the Small Business Administration (SBA). The plaintiff claims that he was denied contract assistance for his business under the SBA's Section 8(a) program because of his race.

Although he was ordered twice by the Court to file an Amended Complaint stating the specific nature of his claim, the plaintiff has failed to do so, and his pleadings do not state *any facts* which support his conclusory allegations of racial discrimination. Defendant SBA filed its Motion for

Summary Judgment, and the plaintiff has responded by expressly refusing to address the facts set forth as undisputed in the defendant's motion and supporting affidavits. Based on the pleadings and affidavits filed herein—which the Court has closely examined because it must be sensitive to the problems faced by *pro se* litigants—the Court finds that there is no genuine issue of material fact and the defendant is entitled to judgment as a matter of law.

SOVEREIGN IMMUNITY

The plaintiff's complaint purports to seek injunctive and declaratory relief as well as damages. This Court has no authority to grant injunctive relief against the SBA. The SBA's waiver of sovereign immunity, codified at 15 U.S.C. § 634(b)(1), does not extend to the issuance of an injunction against the Administrator. *Expedient Services, Inc.* v. *Weaver*, 614 F. 2d 56 (5th Cir. 1980).

The plaintiff's complaint also seeks declaratory relief and contains a general prayer for damages. Although no specific damage is alleged and no specific amount is claimed, the SBA concedes that its sovereign immunity is waived to the extent that the plaintiff may claim monetary damages under 42 U.S.C. § 1981.

PLAINTIFF'S CLAIM

The plaintiff, a black male, claims that the SBA discriminated against him on the basis of his race by failing to give final approval to his applications for assistance under the SBA's Section 8(a) program. This program authorizes the SBA to award government contracts to disadvantaged small businesses to enable them to become competitive.

The application procedure for a small business desiring Section 8(a) assistance consists of two stages. First, the applicant supplies preliminary information on SBA forms

which are used to determine if the applicant owns or controls a disadvantaged small business. Based on this information, the SBA attempts to locate possible government contracts which match the applicant's type of business. If they are, the applicant is notified that he has satisfied the preliminary eligibility requirements—and that he must submit additional materials, including detailed financial, management and technical information regarding his business. From this information, the SBA determines whether the applicant may be given final approval for contract assistance.

The detailed affidavits of SBA personnel establish, beyond doubt, that the plaintiff's failure to obtain Section 8(a) assistance *was not* the result of discriminatory actions of the SBA—and that, in fact, the SBA expended considerable time, effort and money to help the plaintiff obtain final approval.

The plaintiff initially applied for Section 8(a) assistance as a distributor of paper products. His first application was submitted on September 15, 1976, and consisted only of the information necessary to establish his preliminary eligibility as the owner of a disadvantaged small business. The only reason that this application was not approved was because the Dallas SBA office was notified that there was no possible government needs which could be satisfied by a business of the plaintiff's type and size—a small distributor of paper products.

The plaintiff's second application, submitted on July 12, 1977, was not processed due to the Administrator's imposition of a national moratorium on the processing of all Section 8(a) applications. Nevertheless, SBA personnel continued their efforts to help the plaintiff. In August of 1977, while the moratorium was still in effect, the Dallas

office learned of possible contract support for a paper conversion business and met with the plaintiff to discuss the possibility of the plaintiff's operating as a paper converter.

The plaintiff's third application was submitted in November of 1977 after the moratorium was lifted, and it sought assistance for a paper converting business. In December, the plaintiff was told to begin preparing the financial, management and technical information necessary for the SBA to determine his final eligibility. In January of 1978 he was given preliminary approval and told to submit the required business plan information.

From January 1978 through June 1979, the Dallas SBA office expended substantial amounts of time, effort and money to assist the plaintiff in obtaining final approval under the Section 8(a) program. SBA personnel made inquiries of persons in the paper converting industry to supply plaintiff with information about such operations—and even located a source for the equipment which the plaintiff would need to set up a conversion facility. Not only was an SBA business adviser assigned to assist the plaintiff in submitting the required business plan information, but the *SBA also paid over $2,000 to outside business consultants who attempted to assist the plaintiff.*

In spite of repeated requests from the SBA and the business consultants during this 18 month period, the plaintiff failed to supply the needed business plan information and a completed application was never submitted to the SBA. The consultants' reports ultimately concluded that the plaintiff lacked the necessary business and technical expertise and economic resources to operate a paper converting business.

Based on these undisputed facts, the Court finds that the SBA did not discriminate against the plaintiff due to his race or otherwise.

REQUEST FOR APPOINTMENT OF ATTORNEY

The plaintiff has requested the appointment of an attorney to represent him. Some of the material filed by the plaintiff shows that an attorney (Sam Biscoe) did attempt to assist plaintiff with the SBA, but chose not to represent him in this suit. In addition, since the plaintiff's claims are without merit, the proper exercise of this Court's discretion requires that the request for appointment of counsel be denied. Cf. *Caston* v. *Sears, Roebuck & Co.*, 556 F. 2d 1305, 1308-10 (5th Cir. 1977).

CONCLUSION

The plaintiff is understandably upset because he did not receive the SBA contract assistance under the Section 8(a) program. This feeling, and the unsupported conclusions alleged by the plaintiff, do not raise any fact issue of racial discrimination. Accordingly, a final order dismissing this case will be entered in accordance with this Memorandum Opinion.

SIGNED this 9th day of March, 1981.

/s/ JERRY BUCHMEYER

UNITED STATES DISTRICT JUDGE
JERRY BUCHMEYER